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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1064

WILLIAM A. WATERS and DONALD SAMUELS,

Petitioners,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21.

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Petitioners submit this Reply Brief in support of their Petition for a Writ of Certiorari.

As respondents properly recognize, the certworthiness of Questions 1 and 2 involves the relationship of the Seventh Circuit decision in the instant case to the Fifth Circuit decision in *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), cert. granted 43 U.S.L.W. 3515 (1975), No. 74-728. Both the Fifth and Seventh Circuits held that "last hired, first fired" seniority systems were immune *per se* from legal attack. The Fifth Circuit reached this result by holding that it lacked the power to give an aggrieved employee the necessary relief, seniority retroactive to the date on which he was denied a job because of his race. The Seventh Circuit reached this result by holding that such a seniority system was, *as a matter of law*, non-discriminatory. The substance of the Fifth and Seventh Circuit rules is of course the same.

Respondents suggest that the Seventh Circuit decision was based on, or limited to, the facts of this particular case. The portion of the Court of Appeals opinion holding the seniority system non-discriminatory deals exclusively with the language and legislative history of Title VII, and contains no discussion or consideration of the particular seniority system maintained by the Wisconsin Steel Works or its impact on petitioners.[1] The Seventh Circuit's statements that respondents' seniority system did not discriminate was a conclusion of law mandated by its construction of the statute, not a resolution of any disputed fact. In the Court of Appeals respondents expressly sought just this ruling that "[a]s a matter of law, a 'last hired, first fired' seniority system is lawful and cannot be considered an act of discrimination by the employer."[2] Indeed the facts regarding the operation of the "last hired, first fired" system were not seriously in dispute—the system required that preferential treatment be given to white workers who were hired during a period when defendants maintained a policy of not hiring black bricklayers. Whether such a seniority system is unlawful under Title VII or section 1981 poses, as the Seventh Circuit's opinion recognized, questions of law not of fact. The Court of Appeals resolved this matter by adopting a *per se* rule of law that "last hired, first fired" seniority systems were legal. The Third Circuit has so construed the decision below, *Jersey Central Power, etc. Co.* v. *Local*

[1] Respondents quote out of context a statement by the Seventh Circuit that the "last hired, first fired" system does not perpetuate discrimination "in violation of the strictures of Title VII." Respondents deliberately omit the next sentence in the court's opinion, which explains that the basis for the court's conclusion is not the facts of the case but the legislative history of Title VII. Petition, p. 12a.

[2] Brief of Wisconsin Steel, p. 17.

327, 508 F.2d 687, 708-09 (3d Cir. 1975), and employers and unions in at least two other circuits have relied on the decision below as establishing such a rule and conferring complete protection on such systems.[3]

Respondent International Harvester characterizes the Seventh Circuit's refusal to award Waters back pay for the period after September 5, 1967 as within the appellate court's "judicial discretion in formulating equitable relief." Brief of Respondent International Harvester, pp. 25-27. The scope of such discretionary authority to deny back pay is a question already before this Court in *Moody* v. *Albemarle Paper Co.*, No. 74-728. Whatever the scope of that discretion, the Seventh Circuit never gave any explanation for its decision that Waters' right to back pay ended with the disputed job offer of September 5. As respondents' briefs make clear, there were and are disputes as to whether the job offered was conditioned on a waiver or was in all respects the job sought by Waters in his then pending complaint, and as to whether Waters had other reason to believe he would impair his rights if he accepted the job. The Court of Appeals, in

[3] In the Second Circuit the New York City Board of Education has argued "the use of an employment seniority system, which provides that the last hired will be the first fired, in discrimination cases for the purpose of determining which employees are to be laid off for economic reasons has been upheld by the [Court of Appeals] for the Seventh Circuit in *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309 (1974)" Brief in *Chance* v. *Board of Examiners*, No. 75-7161, p. 23.

In the Fourth Circuit the Tobacco Workers' International Union urged "In *Waters* vs. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), the Court held 'bona fide' a seniority system which applied date of hire as the date for determining seniority." Brief in *Patterson* v. *American Tobacco*, No. 75-1259, pp. 9-10.

In responding to the Petition for a Writ of Certiorari in *Franks* v. *Bowman Transportation Co.*, No. 74-728, the United Steelworkers also urged *Waters* established a *per se* rule. Union's Response, p. 3.

cutting off back pay as of September 5, 1967, did not resolve any of these questions; the District Court, in awarding back pay, did not even specify whether or not the amount awarded included compensation for the period after September 5. Whatever may be the discretion of the lower courts under *Moody* in granting or denying back pay, those courts must at the least resolve the underlying disputes of fact and articulate the legal standards being applied.

In opposing Waters' Petition for Writ of Certiorari in this case, No. 74-1064, the union asserts the Seventh Circuit did not hold that respondents had discriminated against Waters. Memorandum In Opposition of United Order of American Bricklayers, pp. 5-8. In seeking Certiorari regarding other aspects of this case, the union takes the opposite position and asserts the Court of Appeals *did* conclude that plaintiff Waters was discriminated against. Petition for Writ of Certiorari, No. 74-1350, p. 8. Although the company appears to agree with the union's position in No. 74-1064, the union's position in No. 74-1350 is in fact the correct one. Petition 9a-10a. Respondents raise a number of other contentions of fact not resolved below, but those contentions, even if upheld, would not establish any defense independent of the questions of law resolved by the Seventh Circuit and regarding which Certiorari is sought.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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